*****REDACTED – FOR PUBLIC INSPECTION*****

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December 8, 2004

Via Electronic Submission

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Notice of Ex Parte – Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338**

Dear Ms. Dortch:

On behalf of SBC Communications, Inc. ("SBC"), I am writing to respond to the December 1, 2004, ex parte filing of Time Warner Telecom ("TWT") in these dockets.[1] Although the filing purports to advocate widespread unbundling of high-capacity loops, the information it provides only confirms that TWT has not used – and does not need – UNEs in order to compete in the enterprise market. To the extent it claims otherwise, TWT's filing rests on a misunderstanding of the D.C. Circuit's binding precedent in this area, as well as mischaracterizations of the record evidence regarding the scope of competitive deployment. Finally, TWT's fall-back position – that the Commission should find no impairment only where a given location generates absurdly high annual telecommunications revenues – is based on a flawed analysis of the costs to deploy new fiber and the revenue opportunities that come with such deployment.

1. TWT's impairment analysis ignores its own successful business plan. TWT contends that CLECs are impaired without UNE access to DS1 and DS3 facilities in virtually every conceivable location. But TWT's own experience belies that assertion. TWT is generating close to three-quarters of a *billion* dollars annually providing telecommunications services to larger business customers and other customers, including CLECs.[2] It has boasted that "[w]hile [RBOCs] have a lot of fiber," it is not clear that "they have more buildings connected than we do in all cases . . . [i]n

[1] *See* Ex Parte Letter of Thomas Jones on behalf of TWT to Marlene Dortch, FCC, CC Docket No. 01-338, WC Docket No. 04-313 (Dec. 1, 2004) ("TWT Letter"), attaching, *inter alia*, Declaration of Graham Taylor and Charles M. Boto on behalf of TWT ("Taylor/Boto Decl.").

[2] *See* Time Warner Telecom News Release, *Time Warner Telecom Announces Fourth Quarter 2003 Results* (Feb. 2, 2004) (total 2003 revenues of $669.6 million); *see also* Time Warner Telecom News Release, *Time Warner Telecom Announces Third Quarter 2004 Results* at 1, 3 (Nov. 3, 2004) (noting the "solid growth" TWT has achieved in 2004).

certain markets they may; in others they may not."[3] TWT's growth has been outstanding, with revenues up approximately $200 million since 2000 and even more dramatically since the late 1990s.[4] And it has done all of this *without purchasing UNEs*. As TWT loudly proclaimed in the wake of the *USTA II* decision, where it "need[s] services from ILECs to connect [its] remote customers to its vast fiber network," it purchases those services not as UNEs but rather "under special access tariffs or under agreements with the ILECs."[5]

Indeed, if anything, TWT's recent filing only underscores the fact that TWT itself – and, by extension, any efficient CLEC – is not impaired without UNE access to ILEC high-capacity loops. TWT emphasizes that the majority of its business – comprising fully *****[REDACTED] ***** of its annual revenues – is served *exclusively* over its own facilities.[6] In addition, where TWT does rely on ILEC facilities, ***** [REDACTED] ***** of the time it purchases DS1s, not DS3s.[7] And, of those DS1 purchases from ILECs, the vast majority -- ***** [REDACTED] ***** -- are instances in which the customer needs ***** [REDACTED] *****.[8] In short, the *only* circumstance in which TWT typically relies on ILEC facilities occurs when it needs to provision ***** [REDACTED] ***** to a given address. And, again, in that narrow circumstance, TWT relies on special access, not UNEs, to compete.

TWT's own filing thus confirms three key points.

- *First*, CLECs don't need unbundled access to DS3s in order to compete. TWT is one of the nation's most successful CLECs, and it has achieved this position without even relying on DS3 *special access*, much less DS3 UNEs, in any meaningful way. The suggestion that CLECs nevertheless are impaired without UNE access to DS3s cannot be credited.

- *Second*, CLECs, including TWT, can and do deploy their own facilities at the DS1 level, particularly where there is the prospect of providing multiple DS1s to a particular address. This point is confirmed, moreover, by the evidence collected in the states, which establishes, among other things, myriad instances in which CLECs – including TWT – have deployed their own facilities solely to provide DS1 service.[9] Indeed, in the state proceedings TWT's own data for California showed that over *** **[REDACTED]** *** of its high-capacity loop facilities consisted solely of one or more DS1 loops.[10]

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[3] *See* Telephony Online, *A Conversation with Time Warner Telecom's Mike Rouleau* (Oct. 29, 2003), attached hereto.

[4] *See* Time Warner Telecom News Release, *Time Warner Telecom Reports 81% Revenue Increase for 2000* (Feb. 7, 2001) (2000 revenues of $487.3 million); *compare* n.2, *infra*.

[5] Time Warner Telecom News Release, *Time Warner Telecom Not Impacted by UNE Ruling* (June 10, 2004) (internal quotation marks omitted), *at* http://www.twtelecom.com/Documents/Announcements/News/2004/News2004_UNE_Ruling. pdf.

[6] *See* TWT Letter at 2 & n.4.

[7] *See id.* at 2.

[8] *See id.*

[9] *See* Alexander/Sparks Decl. ¶ 21 (Attach. B to SBC Reply Comments).

[10] SBC Comments Attach. A-CA Ex. 7 Part 16.

- *Third*, in the relatively few instances where CLECs wish to rely on ILEC facilities, they can do so using ILEC special access, and do not need UNEs. Indeed, SBC's own data show that, of the ***** [REDACTED] ***** TWT has purchased from SBC, only ***** [REDACTED] ***** have been purchased as UNEs.

These points, which are largely confirmed by TWT's own pleading, make clear that CLECs are not impaired without unbundled access to ILEC high-capacity loops.

2. Quite apart from its failure to even acknowledge its own successes in the marketplace – much less to explain how its claims of widespread impairment can be squared with those successes – TWT's filing rests on profound mischaracterizations of the law and the evidence in the record. Perhaps most egregiously, TWT insists that "any loop impairment test must be based on actual, not potential, competition."[11] In other words, in TWT's view, if CLECs have not *already* deployed their own facilities to a given location, that means they *cannot* deploy their own facilities to that location.

That is preposterous. The D.C. Circuit has repeatedly made clear that the Commission may *not* confine its impairment analysis to actual competition, but rather must identify those facilities that are "[]*suitable*" for competitive supply,[12] or, put differently, whether it would be "wasteful" to have multiple facilities-based suppliers.[13] TWT would have this Commission disregard these instructions and, as it did in the *Triennial Review Order*, ask solely whether CLECs have *already* deployed facilities to a particular address. The *USTA II* court has already observed that "[w]e do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment."[14] The Commission should resist TWT's invitation to defy that binding guidance.

TWT nevertheless insists that its "actual competition" approach is appropriate because of purported difficulties associated with obtaining building access.[15] In light of those difficulties, the theory goes, the Commission cannot infer anything from "facilities deployment along similar routes," since those "similar routes" may not have the same building access issues as the route in question.[16] As the Commission stressed in the *Triennial Review Order*, however, "actual marketplace evidence is the most persuasive and useful kind of evidence" to determine whether new entrants, "as a practical matter," have surmounted purported barriers to entry.[17] And, here, that "actual marketplace evidence" establishes that CLECs have deployed fiber – and thus overcome any issues associated with building access – tens of thousands of times. What is more, in the state proceedings, the CLECs for the most part could not identify even a single concrete instance in which they had been denied building access, and several of them who now baldly assert that they are sometimes unable to obtain building access – including TWT – conceded that they were as a rule able to obtain whatever access

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[11] TWT Letter at 3.

[12] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

[13] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 573 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied*, *NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

[14] *Id.* at 575.

[15] *See* TWT Letter at 3; Taylor/Boto Decl. at 9-10.

[16] *See* TWT Letter at 3.

[17] *Triennial Review Order* ¶ 93.

they needed.[18] In those proceedings, TWT itself conceded that it *** **[REDACTED]** ***.[19] Indeed, even here, TWT admits it does not even bother to keep records regarding the extent to which building access is a problem[20] -- which is itself a clear indication that it is not – and it estimates that, for fully ***** [REDACTED] ***** of its new construction, building access is not a meaningful obstacle.[21] In fact, TWT's own affiant, Charles Boto, has alone "completed well over 2,800 building access transactions for [TWT]" and "over 2,000" for MFS.[22] Finally, and in all events, even if building access were an issue – and the evidence makes clear that it is not – the Commission has ample tools to regulate that issue directly and thus cannot use it to justify the drastic remedy of unbundling.[23]

3. TWT's fall-back position is a revenue-based proposal pursuant to which the Commission would find no impairment only at specific locations where the total available revenue exceeds a certain threshold. In TWT's view, if a building in a Tier 1 market generates a total of $450,000 annually – or if a Tier 2 building generates $275,000 annually – then self-deployment would be economical and unbundling could be limited.[24] This contrived proposal is based on unrealistic assumptions and vastly overstated costs. It should be rejected out-of-hand.

As an initial matter, TWT's proposal relies on a fanciful view of competition in the telecommunications industry. TWT states that it "cannot construct loops to any building unless and until customers within a particular building have *actually committed to* purchasing services with adequate revenue to meet TWT[]'s criteria for loop construction."[25] Equally important, the *annual* revenue requirement that it asserts is necessary to warrant self-deployment roughly matches the *total* cost of deploying fiber to a particular building.[26] Thus, in TWT's view, it can deploy its own facilities only where it is *guaranteed* to recover virtually the *entire* cost of deployment in the *first year* of service. Telecommunications, however, is not a risk-free enterprise in which carriers are permitted the luxury of serving only those locations at which they are guaranteed a profit, much less a profit after only a *single* year of service. Contrary to TWT's overriding assumption, the absence of such guarantees does not create impairment.

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[18] *See* Alexander/Sparks Decl. ¶¶ 60-62.

[19] *Id.* ¶ 19.

[20] *See* Taylor/Boto Decl. at 10.

[21] TWT Letter at 3; Taylor/Boto Decl. at 9-10.

[22] Taylor/Boto Decl. at 1.

[23] *See USTA II*, 359 F.3d at 570-71; SBC Reply Comments at 36-37.

[24] *See* TWT Letter at 4-5.

[25] Taylor/Boto Decl. at 8 (emphasis added).

[26] *See* Taylor/Boto Decl. at 4 (where a building is within ***** [REDACTED] ***** of a splice point, the cost to deploy a lateral is ***** [REDACTED] ***** in Tier 1 markets and ***** [REDACTED] ***** in Tier 2 markets); *see id.* at 6 (TWT's annual revenue requirement for self-deployment is ***** [REDACTED] ***** in Tier 1 markets and *****[REDACTED] ***** in Tier 2 markets). Indeed, TWT's claimed annual revenue requirement may even *exceed* its total fiber deployment costs insofar as the cost estimates set forth by TWT include, *inter alia*, "other ongoing expenses such as costs associated with long distance operations, billing and bad debt[;]" "costs associated with one-time and ongoing licenses, fees and franchises[;]" and both "initial and ongoing costs of customer premises equipment[.]" *See id.*

Indeed, TWT's flawed approach to calculating its revenue requirement thoroughly undermines the reliability of its proposal here. To take just one example, the study by Cambridge Strategic Management Group – which TWT claims reaches results that are "very similar" to TWT's[27] -- calculated the annualized revenue requirement for a 2,500 foot lateral in Seattle, a Tier 1 city, at $65,000, whereas TWT's proposed requirement of ***** [REDACTED]***** is nearly ***** [REDACTED] *****. That is so, moreover, even though TWT's cost estimates were in important respects *lower* than those reflected in the extremely conservative Cambridge study.[28] The only explanation for this startling discrepancy – that *lower* cost estimates yield a *higher* revenue requirement – is TWT's unrealistic assumption that it is entitled to a guaranteed recovery of *all* of its costs in the first year of service.

In addition, TWT's proposal is predicated on the unexplained and unsupported assumption that a CLEC can win on average only *** **[REDACTED]***** of the telecommunications service revenues associated with a particular building.[29] This assumption is flawed in two ways. First, TWT says that it often wins *more* than *** **[REDACTED]** *** of the revenue in owner-occupied building and usually wins less than *** **[REDACTED]** *** of the revenues in multi-tenant buildings. But, because TWT fails to provide any information on the frequency of these two scenarios or the variance above and below the *** **[REDACTED]** *** figure, it is impossible to verify the accuracy of that figure, rendering it meaningless for purposes of this proceeding. Second, the past experience of TWT does not constrain the revenues it (or, for that matter, any efficient CLEC) may win in a particular building in the future. Indeed, TWT itself stresses that "many commercial customers have made long-term service commitments" to their existing carrier that limit the total opportunities in a given building *at the outset*.[30] Thus, even if TWT's was able to capture only ***** [REDACTED] ***** of the business in a given building in the *first year* of service – which, again, is all that TWT purports to measure – it is self-evident that over time, as potential customers' contracts expire, it could capture much more.

TWT's analysis is equally flawed on the cost side of the equation. For the most part, TWT provides no support whatsoever for the estimates it has provided. Rather, it simply lists a series of costs – including vague categories such as "costs associated with long distance operations" that would seem to have little if any relevance to lateral deployment – and, without even itemizing those costs, it asserts that they total ***** [REDACTED] ***** in Tier 1 markets and ***** [REDACTED] ***** in Tier 2 markets.[31] That will not do. To provide a remotely plausible basis for Commission action, TWT's proposal would, at a bare minimum, have to break down each of the costs into readily discernable categories, itemize each of those costs, and explain why it is that they reflect the costs of an efficient CLEC. It would have to do so, moreover, at the appropriate stage of the proceeding, so that all parties would have an opportunity to review and comment upon them. In a similar context, the Commission has made clear that carriers advocating Commission action on the basis of the

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[27] TWT Letter at 5.

[28] For example, in ***** [REDACTED] *****, which TWT cites as a Tier 2 market, the Cambridge Study (at 21-22) estimated year 1 capital expenditure for a 500 foot lateral as ***** [REDACTED] *****, and it estimated operational expenses as ***** [REDACTED] *****.

[29] *See* TWT Letter at 4; Taylor Boto Decl. at 6.

[30] *See* Taylor/Boto Decl. at 5-6.

[31] *See id.* at 4.

internal costs of service are required to provide a cost study detailing their conclusions.[32] TWT's 11th hour conclusory assertions are far from that.

Where TWT does provide support for its claims, moreover, its assertions are highly deceptive. It contends, for example, that much of its analysis is drawn from – or at least consistent with – the Cambridge study.[33] Yet, as noted, in *****[REDACTED] ***** markets, TWT departed radically and without explanation from the Cambridge study's results, triggering an assumed revenue requirement that is vastly higher than the extremely conservative number that Cambridge reached.[34] Equally important, TWT's only explanation for the vastly higher costs it supposedly incurs in ***** [REDACTED] ***** as compared to *****[REDACTED] ***** – the bare assertion that trenching costs more in denser areas – is not credible. To the limited extent that TWT has identified the support behind its cost estimates, it has made clear that it assumed that ILEC conduit will *never* be available.[35] But that is an utterly unrealistic assumption. SBC has leased more than 20 million linear feet of conduit to CLECs to date.[36] And, as SBC has explained, even if conduit is not available, that does not mean the CLEC must trench all the way from its splice point to the building. Rather, CLECs can – and the efficient ones do – use the conduit in which their fiber ring runs, typically very close to the customer premises.[37] These are critical facts -- indeed, Cambridge estimates that the availability of ILEC conduit for a 2,500 foot lateral reduces costs by approximately 20%[38] -- yet TWT simply ignores them and relies instead on unsupported and unexplained assumptions that radically inflate its cost estimates.

Finally, and in all events, TWT's proposal is infected by a fatal logical defect. By its terms, TWT's revenue-based carve-out is based on the theory that, where a building generates enough revenue, CLECs can deploy their own fiber. Yet, under TWT's proposal, even where a building meets the threshold, CLECs are *still* entitled to unbundled access to as many DS1s as they could

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[32] *See, e.g.*, Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Vermont*, 17 FCC Rcd 7625, ¶ 70 (2002) (quoting *Sprint Communications Co. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. 2001)), *appeal dismissed, AT&T Corp. v. FCC*, No. 02-1152, 2002 WL 31619058 (D.C. Cir. Nov. 19, 2002).

[33] *See* TWT Letter at 5; *see also id.* (asserting incorrectly that TWT's proposal is "very similar" to an analysis, based on the Cambridge study, that SBC performed in the state proceedings in an effort to seek relief under the unlawful and now-vacated standards set out in the *Triennial Review Order*).

[34] A detailed explanation of the conservative nature of the Cambridge study is included in SBC Comments, Att. A-TX, Exh. 9, Part 10, at 44-46. Among other things, the Cambridge study unrealistically assumes that a CLEC would always use an entire room to house its optronics equipment and that a CLEC would always deploy its own conduit. In addition, the Cambridge study assumes that CLECs will deploy optronics at the OCn level and then channelize the facilities into smaller units. In fact, as at least one CLEC has conceded, transmission equipment is now available at a very low price that allows a carrier to provide DS3 service directly. *See id.*; *see also id.* Att. A-TX, Exh. 9, Part 19, at 30-31, 33-35.

[35] *See id.* (noting that, for ***** [REDACTED] *****, which assumes that no ILEC conduit is available for lease). TWT itself is presumably aware of all this, as it has emphasized that it uses low cost electronics to penetrate multi-tenant bldgs. *See* Time Warner Telecom, *Regional Networks*, attached hereto.

[36] *See* Ex Parte Letter of Tom Hughes, SBC, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338, at 3 (Dec. 7, 2004).

[37] *See* SBC Reply Comments at 37; Keown Decl. ¶ 9 (Attach. D to SBC Reply Comments).

[38] *See* Cambridge Study at 13, 33.

possibly want, as well as to a single DS3.[39] TWT does not explain how the Commission could adopt a test that would identify particular locations where CLECs could expect to recover enough revenue in order to justify deploying their own fiber, and then *still* order unbundled access to DS1s and a single DS3. No such explanation is possible. A defensible finding of impairment by this Commission is an absolute prerequisite to unbundling. Where the Commission determines that CLECs are not impaired without unbundled access to high-capacity loops – and that is so in far, far more locations than TWT's flawed analysis would suggest – the Commission may not order *any* such unbundled access.

Yours truly,

/s/ Gary L. Phillips

cc: Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Jessica Rosenworcel
Scott Bergmann
John Rogovin
Linda Kinney
Jeffrey Dygert
John Stanley
Chris Killion
Jeff Carlisle
Michelle Carey
Thomas Navin
Russell Hanser
Ian Dillner
Jeremy Miller
Cathy Zima
Tim Stelzig
Carol Simpson
Gail Cohen
Chris Cantor

[39] *See* TWT Letter at 4 ("no competitor would be able to lease more than a single unbundled DS3 loop in any building meeting the relevant aggregate revenue threshold").

Attachment

REGIONAL NETWORKS

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Capacities Available	DS-1/DS-3 OC-3/OC-12/OC-48 2.5 Gbps & 10 Gbps Wavelengths	DS-1/DS-3 OC-3/OC-12/OC-48 2.5 Gbps Wavelengths	DS-1/DS-3 OC-3/OC-12/OC-48 2.5 Gbps & 10 Gbps Wavelengths	DS-1/DS-3 OC-3/OC-12/OC-48 2.5 Gbps Wavelengths	DS-1/DS-3 OC-3/OC-12/OC-48 2.5 Gbps Wavelengths
Protection Options Available	– Unprotected – Equipment – Failure Protection – Fiber-cut Protection (selected routes)	– Unprotected – Equipment – Failure Protection – Fiber-cut Protection (all routes)	– Unprotected – Equipment – Failure Protection – Fiber-cut Protection (selected routes)	– Equipment – Failure Protection – Fiber-cut Protection (selected routes)	– Equipment – Failure Protection – Fiber-cut Protection (all routes)
Technologies Available	DWDM & SONET	DWDM & SONET	DWDM & SONET	DWDM & SONET	DWDM & SONET

[1] *In addition to the 34 markets served by company-owned networks, Time Warner Telecom can be the single point of contact from any of 44 metro markets to almost any city in the U.S. or Canada.*

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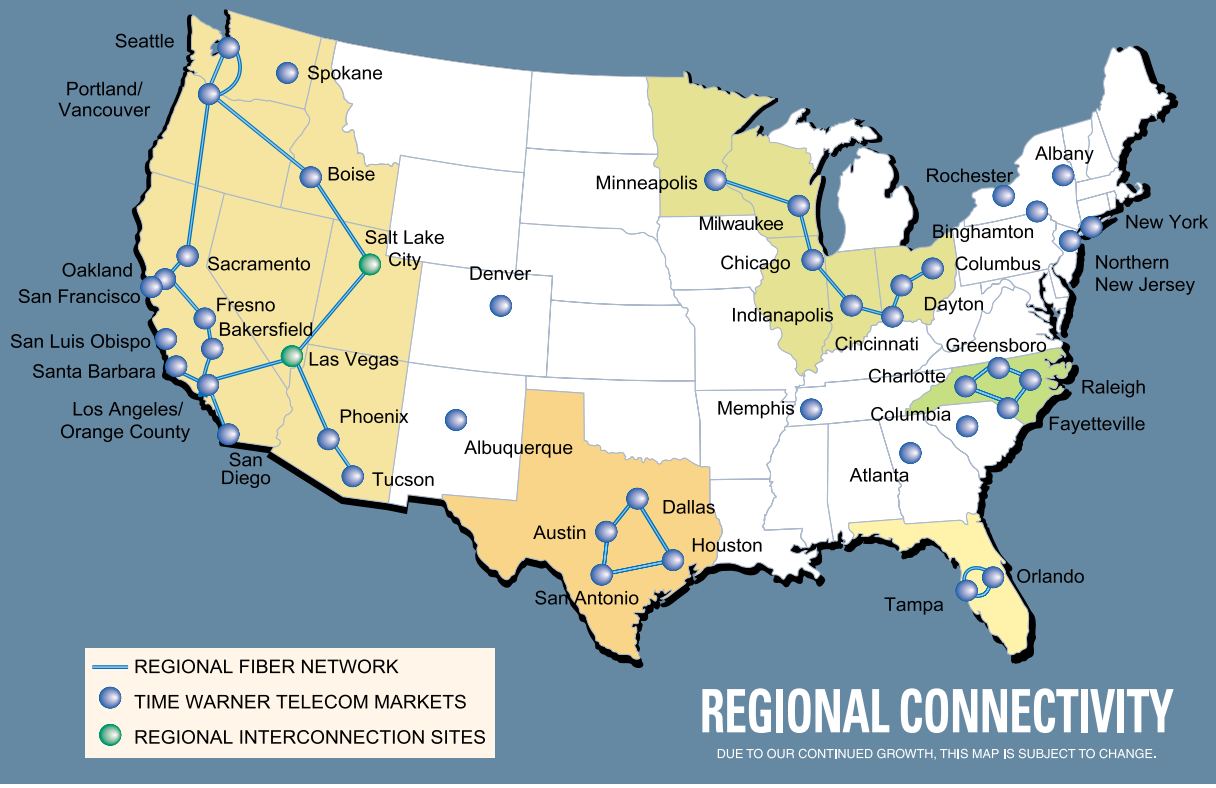

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TELEPHONY ONLINE
A PRIMEDIA Publication

A conversation with Time Warner Telecom's Mike Rouleau

TelephonyOnline.com, Oct 29 2003

On Monday, Time Warner Telecom announced its 500th customer for metro Ethernet services, a 400% increase since the company added switched Ethernet and wavelength-based services (in 10 Mb/s, 100 Mb/s and 1 Gb/s) to its Ethernet-over-Sonet offering six months ago. Mike Rouleau, TWT's senior vice president of business development, told Telephony*'s Ed Gubbins how the company did it and what it will do next.*

On price: The RBOCs are still charging by the mile typically. We don't charge for mileage. And we give customers full line-rate capabilities all the way across town. If a customer signs up for 10 Mb/s, they get 10 Mb/s across town. The RBOCs are typically charging more granularly for bandwidth consumption. And they've got to be concerned about cannibalizing their existing data revenue streams, whereas we don't have legacy frame relay or ATM services to manage. We're aggressively deploying metro Ethernet.

On the market: Year-over-year we've had a 44% increase in data and IP revenues, though we don't break that out by product line. Typical metro Ethernet customers are migrating from frame relay or ATM. We've seen a shift from customers consuming larger ports—half a gig or a gig—to now, when a lot more customers sign up for 10-Mb/s ports due to Internet demand. It's much more scalable and easier to upgrade capacity if they need to because the port will already exist.

On reach: While [RBOCs] have lot of fiber deployed, I don't know that they have more buildings connected than we do in all cases. In certain markets they may; in others they may not. At the end of Q3, we had over 18,000 route-miles of fiber deployed. Of that, 11,345 miles are local, and they connect over 3800 buildings in our 44 markets across the U.S. In Raleigh, N.C., we have 500 to 600 route-miles of fiber. In Houston we have nearly 800 route-miles and almost 200 buildings connected. Those tend to be stronger markets for us. We're using switched native LAN infrastructure to penetrate more buildings because its lower cost electronics allow us to serve more multi-tenant buildings. And we can provide full integration between switched infrastructure and Ethernet-over-Sonet infrastructure to make it look like one network for the customer. The competition has an all-or-nothing kind of choice.

On what's next: In Q4 we'll roll out extended native LAN service to go between all our markets. We've already signed a couple customers but haven't installed them yet. We'll do that over the next couple months. Customers will be able to have end-to-end Ethernet connectivity between Raleigh, New York and Denver [for example]. The service offering will start at 2 Mb/s between markets. So within the metro, we'll give you full-line rate across town. And as you gateway off to different resources in the network, such as storage area networks, the Internet or our IP backbone for the extended native LAN service, we scale the bandwidth in 2-Mb/s increments for the first 10 Mb/s, 5-Mb/s increments from 10 Mb/s to 100 Mb/s and 20-Mb/s increments from 100 Mb/s to 1 Gb/s. If a customer wants a full gig across the country, we're in a position to give them that.